United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7503

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NO. 76-7503

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P/

UNITED SERVICES AUTOMOBILE ASSOCIATION AND
DAVID G. HUMPHREY
Plaintiffs - Appellants

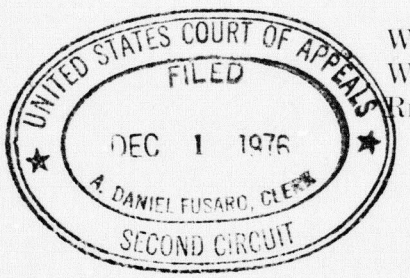
v.

GLENS FALLS INSURANCE COMPANY
Defendant - Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

HONORABLE T. EMMET CLARIE, *Chief Judge*

BRIEF OF PLAINTIFFS-APPELLANTS



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STATEMENT OF ISSUES

A. As to the facts:

1. Were the following findings of fact clearly erroneous: 7, 9, 17, 18, and the portion of 51 starting with "which documents . . ."?

2. Did the Court err in failing to include the following findings proposed by the plaintiffs: 6, 8, 9, 20, 21, 24, 27-30, 33-36, 39-48, 51-53?

B. As to the law:

1. At the time of the accident on February 13, 1962, was Humphrey driving the 1953 Volkswagen with the owner's permission?

2. Did the defendant waive its possible coverage defense of lack of permissive use when it failed to notify Humphrey of its reservation of rights until March 29, 1963 (see Finding 53)?

3. In order to show a waiver of the permissive use defense, need the plaintiff prove actual prejudice?

4. Was the March 29, 1963, reservation letter insufficient regardless of timeliness because it was written and sent by Humphrey's attorney rather than by an agent or employee of the defendant?

5. Did the defendant waive (or was the defendant estopped to assert) its possible coverage defense when attorneys retained by it appeared for and defended Humphrey for over 6 years, and failed to conduct good faith settlement negotiations, and then withdrew from the defense? (see Findings 54 and 55).

6. Did the defendant, as primary carrier, have a duty to United Services Automobile Association, as excess carrier, to make reasonable efforts to settle the tort claim?

STATEMENT OF THE CASE

This is a diversity case involving the rights and duties of primary and excess insurance carriers following an automobile accident. The excess carrier paid a judgment against the operator-insured in the ensuing tort claim, and the excess carrier and the operator have brought this action against the primary carrier claiming damages for the failure by the primary carrier to defend, settle, and pay the tort claim.

After a non-jury trial, the Court rendered a judgment for the defendant against both plaintiffs, and the plaintiffs have appealed.

On February 13, 1962, plaintiff Humphrey was operating a Volkswagen owned by his friend, Albert Pierce, when he struck and injured a pedestrian, Edward Jerz (App. 15a). At the time of the accident, Pierce was the named insured under the terms of a $25,000 limit automobile liability insurance policy with the defendant; at the same time, Humphrey had a similar policy with plaintiff United Services Automobile Association with limits of $100,000 (App. 17a). Both policies have a provision that, in the event of overlapping coverage, the driver's policy was excess and the owner's policy was primary (App. 28a; plaintiffs' proposed finding 6).

Within days after the accident, both carriers were notified of the accident, and both conducted investigations (App. 18a, 26a). These investigations, as confirmed by the evidence at trial, disclosed the following situation concerning Humphrey's use of the car.

Pierce and Humphrey had been close friends for many years prior to the accident, and they had at various times driven each others' car for periods ranging up to one day (App. 68a, 77a-78a; plaintiffs' proposed findings 8, 9). About 10 days or two weeks before the accident, Pierce drove his car, which at that time was unregistered, on public

roads from Sandy Hook (Newtown) to Humphrey's home in an isolated beach area of Guilford (App. 129a). At the time, Pierce wanted to sell his car and felt there would be a better market along the shore. They agreed that Humphrey would attempt to sell it and keep any proceeds over $235.00 (App. 74a). Pierce then took off the license plates in Humphrey's presence and told him that the car was unregistered and uninsured [Note: while there was some confusion about which of Pierce's cars was insured by the defendant, the defendant has never claimed any policy defenses as to Pierce (App. 130a)].

The Court finds that Pierce then told Humphrey that the car was ". . . not to be used off of the private area surrounding Humphrey's home" (F 7), that he ". . . should not take it away from there" (F 9), that Pierce did not ". . . give Humphrey permission to operate the motor vehicle on a public highway in the State of Connecticut" (F 17), and that Pierce did not ". . . give Humphrey permission to operate the motor vehicle for his personal objectives" (F 18). A fair reading of the transcript of Pierce's testimony (which is the evidence most favorable to the defendant's position) shows that Pierce would not unequivocably state that he put any such restrictions on Humphrey's use of the car (App. 74a-77a). Since Pierce and Humphrey were good friends and had used each others' cars in the past, since Pierce wanted his car sold, and since Pierce had himself just driven the unregistered car on the public highway from Newtown to Guilford (a distance of 40-50 miles), the plaintiffs claim that Findings 7, 9, 17, and 18, to the extent quoted above, are clearly erroneous and that the true situation is that Pierce gave Humphrey permission to use the car without any specific instructions.

In any event, a few mornings later, Humphrey, who worked in Meriden, could not start his own car, so he put his own license plates on Pierce's car and drove to work.

As he was returning from work, the accident occurred (App. 3a).

On June 4, 1962, Jerz commenced a Connecticut Superior Court action against both Humphrey and Pierce for $100,000, and alleged that Humphrey was driving the car with Pierce's permission and as his agent (App. 3a). On July 17, 1962, the defendant's chosen counsel, Pouzzner and Hadden, appeared for Pierce, and on August 10, 1962, the same counsel also appeared for Humphrey (App. 3a). The state court file also discloses that Pouzzner and Hadden answered the complaint and filed a special defense of contributory negligence on behalf of both defendants on August 31, 1962 and the plaintiff closed the pleadings on September 4, 1962 (Pl. Exh. 45).

Meanwhile, the investigation by both carriers of the circumstances surrounding Humphrey's use of the car was such that, by the time Pouzzner and Hadden appeared for Humphrey, the defendant had sufficient information to make a decision about its possible coverage defenses concerning Humphrey, and indeed, Pouzzner and Hadden had sufficient information to hazard an opinion that such a defense would probably not be successful (App. 130a; plaintiffs' proposed findings 20, 21).

Yet, in spite of prompting by Pouzzner and Hadden, the defendant did not notify Humphrey of any reservation of rights, and Humphrey was not notified of such a reservation until March 29, 1963, when Pouzzner and Hadden (which at that time was representing Humphrey) notified him of Glens Falls' position (App. 33a). At no time did Glens Falls itself ever send a reservation of rights letter to Humphrey (App. 84a; plaintiffs' proposed finding 24).

Between 1962 and 1968 Pouzzner and Hadden continued to represent Pierce and Humphrey as the tort case wound its way up the court calendar; meanwhile, attorneys for United Services inquired about the progress of the case

with Pouzzner and Hadden but did not enter an appearance for Humphrey (App. 4a).* In January, 1968, a pretrial was held at which the plaintiff demanded $37,500, the defendants, through Pouzzner and Hadden, offered nothing, and the judge recommended $30,000 (App. 4a). Attorney Winer, representing United Services, became aware of these negotiating positions later that month (App. 59a), and in September, 1968, Attorney Clarence Hadden of Pouzzner and Hadden informed Winer that the plaintiff's $37,500 was "way out of line," that the judgment would be around $20,000, and that the plaintiff might accept something less (App. 35a; plaintiffs' proposed findings 33, 34).

In August and September, 1968, Pouzzner and Hadden had numerous correspondence with Humphrey indicating that it was requiring him to be available to attend the trial, and that it was preparing to represent him in the impending trial (App. 29a, 44a-47a; plaintiffs' proposed finding 35). Meanwhile, inter-office memos show that Glens Falls in 1967 and 1968 had no intention whatsoever of doing anything to settle the case (App. 31a-33a; plaintiffs' proposed finding 40).

In September, 1968, a second pretrial was held at which William Hadden objected to the presence of counsel from United Services because it had not filed an appearance (App. 88a; plaintiffs' proposed finding 36); thereafter in October, 1968, Jerz amended his complaint to withdraw the action against Pierce, and Pouzzner and Hadden in November, 1968, was permitted by the Court to withdraw as attorneys for Humphrey (App. 5a).

On January 8, 1969, Attorney Winer's firm appeared for Humphrey as requested by United Services, and had difficulty obtaining the defense file from Pouzzner and Hadden (App. 90a). On January 23, 1969, Attorney Winer was

*There was conflicting expert testimony about whether it was the customary practice of Connecticut attorneys hired by the excess carrier to appear in the tort case when a firm hired by the primary carrier has already appeared (contrast App. 82a with App. 105a).

sent a letter from Pouzzner and Hadden indicating that they had felt in 1966 that the case was one of probable liability and probably would result in a verdict of $25,000 or more (App. 35a-37a; plaintiffs' proposed finding 39).

The Court finds (F 51) that the documents turned over to Winer's office by Pouzzner and Hadden on January 8, 1968, ". . . were sufficient to bring said firm up to date on all material happenings in the case to the date thereof." The 1966 letter alone, which was not sent until January 23, 1969, and which is obviously crucial to any attorney entering a case in place of another attorney who has been in the case for 6 years, refutes that finding.

Winer's difficulties in being able to conduct reasonable settlement negotiations in 1969 were compounded by the fact that Jerz's attorney was involved in a serious automobile accident in early 1969 (App. 64a; plaintiffs' proposed finding 41). In the fall of 1969, the case was reached for trial before Judge Parskey. Another pretrial session was held at which the judge indicated he thought the case was worth more than $40,000; at that point, the plaintiff made no demand (App. 65a; plaintiffs' proposed finding 42).

Glens Falls refused to participate in any way in the settlement or trial of the case at that time (Pl. Exh. 21-23; plaintiffs' proposed finding 43); and the trial started on November 4, 1969.

On November 8, 1969, Judge Parskey indicated to the attorneys in chambers that he felt the ad damnum of $100,000 was insufficient and that the case was worth $250,000 (App. 67a; plaintiffs' proposed finding 44). This statement was immediately conveyed to Humphrey, who of course became very upset and concerned (App. 69a, 98a; plaintiffs' proposed finding 45). However, the next morning Judge Parskey remarked that he had changed his mind and would not permit the ad damnum to be raised (App. 93a;

plaintiffs' proposed finding 46). This statement was conveyed to Humphrey, but with the caution that the plaintiff intended to press such a motion and there was no assurance what the Court would do (App. 94a; proposed finding 47). In fact, the plaintiff filed a motion on November 11 to raise the ad damnum to $200,000, but this motion was denied on November 12 (App. 67a; plaintiffs' proposed finding 48).

The jury brought in a plaintiff's verdict for $42,000 on November 13, 1969; the Court granted an additur to $65,000; and the Connecticut Supreme Court reversed and reinstated the verdict, *Jerz v. Humphrey*, 160 Conn. 219, 276 A.2d 884.

United Services then paid the judgment, plus costs and interest to May 3, 1971, in the amount of $45,747.65; on May 26, 1971, United Services paid reasonable attorney's fees and expenses to defend Humphrey in the *Jerz* action in the amount of $9,480.24, and paid reasonable attorney's fees and expenses to monitor the *Jerz* case prior to appearing for Humphrey in January, 1969, in the amount of $3,003.25 (Pl. Exh. 2-3, 66-67; plaintiffs' proposed findings 51-53). Humphrey incurred expenses to attend the trial of approximately $800-900 (App. 70a-71a), and also incurred the anguish and humiliation incident to the trial and appeal, and incident to the possibility at one point of a verdict exceeding even United Services' limits. It is these damages and expenses, plus interest, which the plaintiffs now claim are owed by the defendant.

ARGUMENT

1. Permissive Use

If this Court accepts the plaintiffs' attack on Findings 7, 9, 17, and 18, then the situation is that Pierce gave Humphrey permission to use the car, but said nothing specific about where or when Humphrey could use it.

In *Dickinson v. Maryland Casualty Co.*, 101 Conn. 369, 125 A. 866, the Court held that the word "permission" is ambiguous, and can mean either permission to use the car or permission to use the car for a specified purpose. The Court then chose the former meaning by stating: "In the presence of a reasonable doubt, we must resolve it in favor of the insured." 101 Conn. at 379, 125 A. at 869. *Mycek v. Hartford Accident and Indemnity Co.*, 128 Conn. 140, 20 A. 2d 753, later limited *Dickinson* by holding that this meaning of Permission does not apply if permission has been specifically limited to a particular use. In *Mycek*, the driver was specifically and unequivocally limited "to the business of his employers during business hours." 128 Conn. at 141-42, 20 A. 2d at 735-36.

That *Dickinson* is still good law when the owner did not specifically limit the permissive use is shown by *Libero v. Lumbermen's Mutual Casualty Co.*, 141 Conn. 574, 108 A. 2d 533. That case concerned the meaning of "actual use" and held, 141 Conn. at 578, 108 A. 2d at 535, that the policy language in *Dickinson* was "radically different". It is important to note that the language litigated in *Dickinson* is similar to that in the Glens Falls policy:

> *Dickinson*, 101 Conn. at 371, 125 A. at 867: ". . . provided such use or operation is with the permission of the named Assured . . ."
>
> Glens Falls policy, I Persons Insured, (a) (2): ". . . provided the use is within the scope of such permission;". (App. 7a).

The use of language similar to the *Dickinson* case is not accidental; later on, Glens Falls has an alternative section (not applicable to this case) which employs the "actual use" language which is similar to the *Libero* case (App. 29a).

Since Humphrey was given control of the car with no specific unequivocal restrictions, he is an (a) (2) additional insured of Glens Falls under the reasoning of the *Dickinson* case.

2. Waiver by Late Reservation of Rights

Since the defendant had sufficient information upon which to decide whether to send Humphrey a reservation of rights letter on August 10, 1962 (the date Pouzzner and Hadden appeared on behalf of Humphrey), and since it did not do so until Pouzzner and Hadden sent him such a letter on March 29, 1963, by which time the pleadings had long been closed, the defendant has clearly waived any coverage defense it may have had.

The Connecticut cases make clear that the insurance company will waive its coverage defenses if it does not reserve its rights at the time the attorneys hired by it appear for the insured. In *Andover v. Hartford Accident and Indemnity Co.*, 153 Conn. 439, 217 A. 2d 60, waiver was found when the insurance company

> ". . . caused an attorney to file a general appearance without a disclaimer or reservation of its rights and actually proceeded with the defense by pleading a successful demurrer . . ." 153 Conn. at 445, 217 A. 2d at 63-64.

That the reservation letter must be sent at the same time as the appearance is entered is made explicit in dicta in *Basta v. United States F. & G. Co.*, 107 Conn. 446, 140 A. 816.

> "An insurer is not estopped to set up the defense that the assured's loss was not covered by the contract of indemnity by the fact that the insurer participated in the action against the assured, if *at the same time* it

gives notice to the assured that it does not waive the benefit of such a defense." 107 Conn. at 450, 140 A. at 818. [emphasis added]

Even if the defendant were still investigating its rights in August, 1962, the Connecticut rule is that

> "In order to waive a claim of law, it is not necessary in that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy." *Jenkins v. Indemnity Ins. Co.*, 152 Conn. 249, 257-58, 205 A. 2d 780, 784.

With these three cases, it seems obvious that an eight and one-half month delay could not be construed to be "at the same time."

The Connecticut cases are reenforced by out-of-state cases that have faced the issue. When the insurer assumed to conduct the defense without notice of reservation for a little over a year, one court held that it cannot thereafter make a reservation of rights. *Socony Vacuum Oil Co. v. Continental Casualty Co.*, 67 N.E. 2d 836, aff'd. 144 Ohio St. 382, 59 N.E. 2d 199. A similar result was reached in another case where there was a twelve month delay after its assumption of the defense. *Henry v. Johnson*, 191 Kan. 369, 381 P. 2d 538. More in point, the reservation of rights was ineffective where given nine months after the accident and four months after action commenced. *Merchants Indemnity Corp. v. Eggleston*, 68 N.J. Super. 235, 172 A. 2d 206. In *Salerno v. Western Casualty & Surety Co.*, 336 F. 2d 14, the Eighth Circuit applied this rule to a ten month delay, and this case is particularly important because the insurer obtained information after it assumed the defense of the action that made its coverage defense stronger. Finally, in *Missouri Managerial Corp. v. Pasqualino*, 323 S.W. 2d 244, 251 (Mo. App.), an accident occurred in July 1955, the company knew of the reason for non-coverage (exchange of cars) by September 1955, but did not reserve its rights until Febru-

ary 13, 1956. The company was held to have waived its potential defense.

These cases must be contrasted with other cases where the notice was held timely. See *Midland Nat. Ins. Co. v. Watson,* 188 So. 403 (Fla. App.) (notice given one day after insurer received notice of injury and of lawsuit); *U.S. Casualty Co. v. Home Ins. Co.,* 79 N.J. Super. 493, 192 A. 2d 169 (8 days after filing answer to complaint).

All of these cases were brought to the attention of the trial court, and the court should have found a waiver.

3. Need for Actual Prejudice from Late Notice

Although the *Basta* citation, *supra* at pp. 9-10, refers to the concepts of estoppel and waiver in the same sentence, the *Andover* and *Jenkins* cases clearly distinguish between these concepts. In *Andover,* the Court specifically held that there was no evidence of prejudice, and yet held that the policy defense had been waived. 153 Conn. at 444, 217, A. 2d at 63-64. In *Jenkins* the Court stated it did not have to discuss the concept of estoppel, because it held the policy defense had been waived. 152 Conn. at 256-59, 205 A. 2d at 783-85.

In discussing the situations where estoppel as opposed to waiver applies, some cases suggest a distinction between policy conditions, which can clearly be waived, and questions as to whether there was insurance covering the claim against the allegedly insured person in the first place. This distinction was discussed and rejected by Superior Court Judge (later Chief Justice) O'Sullivan in *Bronkie, Adm'x v. Lumbermen's Mutual Casualty Co.,* 3 Conn. Supp. 364, 370-71 (a case which has been twice cited by this Court on other issues, *Employers' Liability Assur. Corp. v. Travelers Ins. Co.,* 411 F. 2d 862, 865; *Mundry v. Great American Insurance Company,* 369 F. 2d 678, 682, n. 9).

While the Connecticut Supreme Court has not addressed this precise issue, the waiver doctrine was in fact applied in the *Jenkins* case, 152 Conn. 249, 205 A. 2d 780, which involved not simply the waiver of a condition in the policy, but rather the waiver of a right to claim that the insurance covered claims by the insured's spouse.

The validity of the waiver doctrine in this case is supported by the out-of-state cases cited *supra* at p. 10. Both the *Socony-Vacuum* and the *Henry* cases seem to use waiver and estoppel interchangeably, but both cases rule in favor of the insured without any discussion of facts showing actual prejudice. In the *Eggleston* case, the doctrine of waiver was applied in a case involving both the named insured (Eggleston) and the driver (Tussel), who was not a named insured. No distinction was made between the rights of Eggleston and those of Tussel, and the doctrine of waiver was applied to both.

Even if estoppel rather than waiver is considered on this issue, the *Eggleston* and *Pasqualino* cases hold that there is a presumption of prejudice from a failure to communicate a timely reservation of rights. This accords with another section of the *Bronkie* opinion, 3 Conn. Supp. 364, 372. Both *Eggleston* and *Bronkie* imply what *Pasqualino* makes explicit: this presumption of prejudice is nonrebuttably.

Perhaps the discussion is best capsulized by the statement from the *Eggleston* case:

> "We think it a sound principle, and so hold, that when the insurer has had full knowledge of all facts giving rise to possible rights of disclaimer before commencement of the primary action against the insured, but nevertheless assumes command of that action without reservation of rights and proceeds to file all necessary pleadings and to engage in discovery maneuvers, it has embarked on a firm commitment which must reasonably be construed as a waiver of those rights." 68 N.J. Super. at 257, 172 A. 2d at 217-18.

4. Ineffectiveness of Communication of Reservation by Insured's Attorney

It is clear that the only reservation of rights letter sent to Humphrey at any time was the one sent by Pouzzner and Hadden on March 29, 1963 (App. 84a). But for that letter, this case would not be here today. On March 29, 1963, to the extent the interests of Glens Falls and Humphrey were adverse, it was the obligation of Pouzzner and Hadden to represent Humphrey and not Glens Falls.

Since Pouzzner and Hadden was representing the interests of Humphrey on March 29, 1963, the letter can only be characterized as a privileged communication between an attorney and his client in which the attorney is giving his client legal advice for the client's benefit. Obviously, Glens Falls cannot properly benefit from such a communication.

The only way Glens Falls could claim advantage from this letter would be to assume that it and Pouzzner and Hadden were trying to "build a case" against Humphrey (compare *Employers Casualty Co. v. Tilley,* 496 S.W. 552, (Tex.), and *Pacific Indemnity Co. v. Acel Delivery Service, Inc.,* 485 F. 2d 1169, 1176), by having Pouzzner and Hadden write, as agent of Glens Falls, to Humphrey. Glens Falls surely cannot claim the benefit of such an interpretation of the letter.

5. Waiver or Estoppel by Defending Humphrey for Six Years

Glens Falls defended Humphrey for over six years before instructing its counsel to withdraw. While the Court held that Glens Falls had no choice but to appear for Humphrey (App. 10a), actually Connecticut law was unsettled at the time, and it has since been determined that Glens Falls could have taken its chances in refusing to defend an alleged additional insured. *Keithan v. Massachusetts Bonding &*

Ins. Co., 159 Conn. 128, 138-42, 267 A. 2d 660, 665-67. Obviously, it would have been risky for Glens Falls to take its chances before *Keithan* was decided, but Glens Falls cannot convert that risk into an "obligation" to defend Humphrey. If Glens Falls had refused to appear for Humphrey in 1962, and if Humphrey or Jerz had later sued Glens Falls for that refusal, one can be certain that Glens Falls would have taken full advantage of *Keithan* when it was handed down.

Whether or not Glens Falls had a duty to defend Humphrey prior to 1968, the law is:

> ". . . whichever is the case [whether or not the insurer originally had a duty to defend the insured], the fact that the insurer assumes the defense may give rise to a duty to continue with the defense and make the insurer liable for its withdrawal therefrom, although it would not have been liable if it had not assumed the defense in the first instance." 44 Am. Jur. 2d, Insurance §1557.

In the next section is stated:

> "According to the general rule, an insurer which withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured . . ." See also Annotation, 167 A.L.R. 243, 245-52.

Here the prejudice is patent, as the evidence shows, since Glen Falls made no attempt whatever to settle the case from 1962-68, when prospects were most favorable, (App. 31a-33a). It is noteworthy that most of the cases cited in the A.L.R. annotation found prejudice, and the three cases that found no prejudice, 167 A.L.R. at 251-52, involved situations where the insured was in a much weaker position than Humphrey. In one case, the insurer withdrew almost three years before trial; in another case, the insurer withdrew when the insured failed to attend the trial; and in the third case, the insurer withdrew when it discovered that it was fraudulently induced to defend.

Later cases have used the same language about presuming prejudice from the insurer's withdrawal of defense as in the late reservation cases. In *Fidelity and Casualty Company of New York v. Riley,* 380 F. 2d 153, 156, the Fifth Circuit, citing Georgia law, held that:

> ". . . the insurer's consent in going forward with the defense operates as an estoppel to later contest an action upon the policy . . . Good faith in such a case is not an issue, and prejudice to the insured by the assumption and the conduct of the defense is conclusively presumed."

6. Duty to Excess Carrier

If Humphrey was an additional insured whether because of permissive use or because of waiver or estoppel, then Glens Falls breached its duty to defend Humphrey when it instructed its counsel to withdraw its appearance for Humphrey to trial. See *Lee v. Aetna Casualty & Surety Co.,* 178 F. 2d 750. There is nothing in the Glens Falls policy which limits the duty to defend to the allegations of the complaint.

The defendant having knowingly failed in its duty, "reason dictates that the defendant should reimburse the plaintiff for the full amount of the obligation reasonably incurred by it." *Missionaries of Co. of Mary, Inc. v. Aetna Casualty & Surety Co.,* 155 Conn. 104, 114, 230 A. 2d 21. This would include the full settlement, expenses, attorneys' fees and interest, *Id,* up to the policy limits. *Schurgast v. Schumann,* 156 Conn. 471, 491, 242 A. 2d 695. See also *Jenkins v. Indemnity Insurance Co.,* 152 Conn. 249, 261, 205 A. 2d 780, which, while involving New York law, cites the general authority at 49 A.L.R. 2d 694, 718, 721.

If Humphrey was an additional insured, Glens Falls had the further duty to attempt in good faith to settle the case. The law is clear that a failure to conduct good faith settle-

ment negotiations, such as was obvious in this case, may entail liability in excess of the policy limits. *Bartlett v. Travelers Ins. Co.,* 117 Conn. 147, 156, 167 A. 180. *Cf. Bourget v. Government Employees Insurance Co.,* 456 F. 2d 282, 285. Such liability would include consequential damages and compensation for pain and suffering. See decision of Judge Zampano on motion to dismiss, now reported at 350 F. Supp. 869, and which is not challenged by cross-appeal. Some cases have also included expenses for prosecuting declaratory judgment actions, *Southwestern Bell Tel. Co. v. Western Casualty & Surety Co.,* 269 F. Supp. 315 (D. Mo.); *Utilities Construction Corp. v. Peerless Ins. Co.,* 269 F. Supp. 64 (D. Vt.), and so these cases would arguably support a recovery of attorneys fees and costs for prosecuting this action.

While there are no Connecticut cases on the subject of the rights of an excess carrier to stand in the shoes of the insured, several decisions have permitted the excess carrier to recover from the primary carrier to the same extent that the insured could have. See *New Amsterdam Cas. Co. v. Certain Underwriters,* 34 Ill. 2d 424, 216, N.E. 2d 665, 669; *National Farmers Union Property & Cas. Co. v. Farmers Ins. Group,* 14 Utah 2d 89, 377 P. 2d 786. Since United Services had a duty to defend Humphrey when Glens Falls did not, United Services clearly was not a volunteer or intermeddler. *Continental Cas. Co. v. American Fidelity & Cas. Co.,* (7th Cir.) 275 F. 2d 381, 385. As the Fourth Circuit said in *American Surety Co. of N.Y. v. Canal Ins. Co.,* 258 F. 2d 934, 937:

> "Losses should not fall irrevocably upon that insurer which first recognizes its obligations, while one neglectful of its duty is allowed to escape."

The most recent case on the subject states:

> "We hold that an excess insurer is subrogated to the insured's rights against a primary insurer for breach of the primary insurer's good-faith duty to settle. See,

Peter v. Travelers Ins. Co., 375 F. Supp. 1347 (C.D. Cal. 1974)." *Continental Cas. Co. v. Reserve Ins. Co.*, 238 N.W. 2d 862 at 864 (Minn.).

See also cases cited at footnote 7 of the opinion, 238 N.W. 2d at 865.

Since Glens Falls has admitted by the plaintiffs' request to admit that, if Humphrey was covered, the Glens Falls policy was primary and the United Services policy excess (App. 28a), United Services is clearly entitled to recover its full damages in this case.

CONCLUSION

Plaintiff United Services Automobile Association claims that the judgment should be reversed and judgment entered by this Court as follows:

1. $45,747.65, the judgment it paid to Jerz on behalf of Humphrey, plus interest at 6% from May 3, 1971.

2. $9,480.24, the cost of reasonable legal fees and expenses for defending Humphrey, plus interest at 6% from May 26, 1971.

3. $3,003.25, the cost of reasonable legal fees and expenses for monitoring Humphrey's case from 1962-68, plus interest at 6% from May 26, 1971.

4. $ for the reasonable legal fees and expenses for prosecuting this action.

Plaintiff David G. Humphrey claims that judgment should be reversed and judgment entered by this Court as follows:

1. $800.00 for the expense of attending trial, plus interest at 6% from November 13, 1969.
2. $ for the anguish and suffering of the trial and appeal proceedings.

Since the trial court ruled against the defendants, it did not fix the amount of Humphrey's damages. However, all of the facts relevant to this have been referred to in the statement of the case, *supra* at pp. 6-7, and plaintiff Humphrey therefore requests this Court to enter an appropriate damage figure rather than to remand for further proceedings.

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED SERVICES AUTOMOBILE ASSOCIATION
and DAVID G. HUMPHREY

Plaintiffs-Appellants

VS

GLENS FALLS INSURANCE COMPANY

Defendant-Appellee

DOCKET NO. 76 7503

(District of Conn.
Civ. No. 14689)

I hereby certify that I placed 2 copies of the appellants' brief and 1 copy of the joint appendix in the mail postage prepaid to William L. Hadden, Esq., 129 Church Street, New Haven, Connecticut, on November 30, 1976.

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